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No. 86-1936

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

EDWARD MURRAY, Director,
Virginia Department of Corrections,

Petitioner,

v.

ALBERT L. WILSON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR ALBERT L. WILSON IN OPPOSITION

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QUESTION PRESENTED

Did the Court of Appeals correctly find that Albert Wilson's confession was obtained in violation of his Fifth Amendment and Sixth Amendment rights to counsel and should have been suppressed?

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....i

TABLE OF CONTENTS.....ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF THE CASE.....1

ARGUMENT.....4

THE COURT OF APPEALS CORRECTLY FOUND THAT WILSON'S CONFESSION WAS OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS TO COUNSEL AND SHOULD HAVE BEEN SUPPRESSED.....4

1. WILSON ADEQUATELY ASSERTED HIS RIGHT TO COUNSEL AT THE INITIAL APPEARANCE.....5

2. THE POLICE SUBJECTED WILSON TO THE FUNCTIONAL EQUIVALENT OF INTERROGATION.....7

CONCLUSION.....11

TABLE OF AUTHORITIES

Cases

Arizona v. Mauro, 107 S. Ct. 1931 (1987).....8, 9, 10

Brewer v. Williams, 430 U.S. 387 (1977).....7

Johnson v. Zerbst, 304 U.S. 458, 464 (1938).....7

Kirby v. Illinois, 406 U.S. 682, 689 (1972).....5

Maine v. Moulton, 474 U.S. 159, ___, 106 S. Ct. 477, 487 (1985).....6

Massiah v. United States, 377 U.S. 201 (1964).....7, 10

Michigan v. Jackson, 475 U.S. ___, 106 S. Ct. 1404, 1408-09, 1411 (1986).....4, 5, 6, 7

People v. Ferro, 92 A.D.2d 298, 460 N.Y.S.2d 585 (1983), rev'd, 63 N.Y.2d 316, 472 N.E.2d 13, 482 N.Y.S.2d 237 (1984), cert. denied, 472 U.S. 1007 (1985).....10

People v. Ferro, 63 N.Y.2d 316, 323-24, 472 N.E.2d 13, 17, 482 N.Y.S.2d 237, 241 (1984), cert. denied, 472 U.S. 1007 (1985).....11

People v. Thompson, 107 Ill. App. 3d 285, 437 N.E.2d 916 (1982).....8

Rhode Island v. Innis, 446 U.S. 291, 301 & n.7 (1980).....8, 10

Tierney v. State, 404 So. 2d 206 (Fla. App. 1981).....8

Toliver v. Gathright, 501 F. Supp. 148, 153 (E.D. Va. 1980).....8, 10

United States v. Criswell, 696 F.2d 636, 639 & n.7 (8th Cir. 1983).....10

United States v. Johnston, 268 U.S. 220, 227 (1925).....5

Wainwright v. State, 504 A.2d 1096, 1102-03 (Del.), cert. denied, 107 S. Ct. 236 (1986).....8

Weatherford v. Bursey, 429 U.S. 545 (1977).....7

Other Authorities

28 U.S.C. § 2254.....3

Sup. Ct. R. 17.....5, 11

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BRIEF FOR ALBERT L. WILSON IN OPPOSITION

Albert L. Wilson ("Wilson") respectfully requests that the Petition for Certiorari filed by Edward Murray, Director, Virginia Department of Corrections ("the Commonwealth') be denied.[1/]

STATEMENT OF THE CASE

On February 8, 1981, Wilson was arrested by the Norfolk, Virginia police pursuant to an arrest warrant charging him with robbery, burglary, murder and abduction. Upon Wilson's arrest, Detective L. W. Hemenway sought to interrogate him. Hemenway presented Wilson with a Legal Rights Advice Form

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1/ Wilson concurs in the Commonwealth's report of the opinions below, statement of jurisdiction, and designation of the constitutional provisions involved. "J.A. ____" citations refer to the Joint Appendix filed in the Court of Appeals. Citations to the opinions below are made by reference to the Petition appendix, 1a to 26a.

which outlined Wilson's Miranda rights. Wilson acknowledged on the Form that he understood those rights, but he refused to waive the rights and refused to declare that any statement he made would be "free and voluntary."

The parties dispute whether Wilson said anything further that day.[2/] It is, however, uncontroverted that Wilson did not waive his right to counsel on February 8 and did not make any inculpatory statement. In fact, on that date Wilson adamantly refused to sign anything, including a form which merely indicated that the police had not taken any of his personal property.

Wilson remained in police custody after the February 8 interrogation. On either February 9 or February 10, Wilson was taken to General District Court for his initial appearance. There, consistent with his February 8 refusal to waive his right to counsel, Wilson told the judge that he wished to be represented by an attorney of his own choice and that he was attempting to make arrangements to retain an attorney. Wilson was returned to police custody after this court appearance.

During this same period the police arrested Vernon Lee Sessoms for participation in the crimes of which Wilson was accused, and the police obtained a statement from Sessoms. According to Hemenway's testimony, Sessoms told the police that Wilson would be willing to talk to the police once he knew that the police had Sessoms in custody and that Sessoms had

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2/ The Petition, in stating that Wilson "proceeded to disavow any knowledge of the crime" and that Wilson never refused to talk to the police, accepts as accurate Hemenway's testimony at the state court suppression hearing. (J.A. 108-09). That testimony, however, was contradicted by Wilson's testimony that all he told the police on February 8 was that he did not want to talk to them. (J.A. 122-23). The state court did not make any finding or ruling which resolved this dispute. Hemenway's version is not entitled to any presumption of correctness.

cooperated. By Hemenway's own testimony, it was for that reason -- i.e., because the police thought they could get Wilson to talk -- that the police returned to Wilson's cell on February 10. (J.A. 109-10, 118). It is undisputed, and the state trial judge expressly found, that the police initiated this contact wholly on their own and that Wilson never contacted the police to indicate any desire to talk to them.

According to Hemenway, when the police told Wilson they had Sessoms in custody, Wilson said he did not believe them. Wilson is not alleged to have said he wanted to see Sessoms, but merely is alleged to have said he did not believe the police. Again, acting wholly on their own initiative, the police removed Wilson from the Norfolk City Jail and took him to the Detective Bureau, where they confronted him with Sessoms. According to Hemenway, Wilson then agreed to talk to the police, and he gave a statement which admitted that he participated in removing goods from the house where the robbery and burglary occurred.

This incriminating statement was introduced into evidence at Wilson's trial over the objections of Wilson's counsel. The only other evidence at trial linking Wilson to the crimes was testimony from one of Wilson's co-defendants. Wilson was convicted of robbery and burglary and sentenced to imprisonment for life plus twenty years.

After exhausting his state appellate and habeas corpus remedies, Wilson filed a petition pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia, Norfolk Division, asserting that the state trial court's failure to suppress his confession, which had been obtained in violation of his right to counsel, violated his constitutional rights. Acting on a magistrate's recommendation,

the District Court dismissed the petition. Wilson then appealed to the United States Court of Appeals for the Fourth Circuit. A unanimous panel of the Court of Appeals reversed the District Court and ordered that the writ of habeas corpus should issue, holding that the admission into evidence of Wilson's incriminating statement violated his rights to counsel under the Fifth and Sixth Amendments. The Commonwealth filed a petition for rehearing and suggestion for hearing en banc. No member of the Court of Appeals requested a poll on the suggestion for rehearing en banc, and the petition was denied. The Commonwealth subsequently released Wilson from prison. The instant Petition followed.

ARGUMENT

THE COURT OF APPEALS CORRECTLY FOUND THAT WILSON'S CONFESSION WAS OBTAINED IN VIOLATION OF HIS FIFTH AMENDMENT AND SIXTH AMENDMENT RIGHTS TO COUNSEL AND SHOULD HAVE BEEN SUPPRESSED.

The Commonwealth acknowledges that the Court of Appeals applied the correct standard in determining whether the confession should have been suppressed. This Court had established that standard very recently in Michigan v. Jackson, 475 U.S. ___, ___, 106 S. Ct. 1404, 1411 (1986):

> We thus hold that, if police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

The Commonwealth asserts, however, that two of the elements of that standard were not satisfied: The Commonwealth contends that Wilson's actions at the initial appearance did not constitute an assertion of his right to counsel and that the actions of the police did not constitute interrogation.

The Commonwealth simply disagrees with the Court of Appeals' conclusion as to how the particular facts of this case fit within the established standard. As this Court has long recognized, it is not the function of certiorari to provide such review of specific evidence and facts. See, e.g., United States v. Johnston, 268 U.S. 220, 227 (1925). The decision by the Court of Appeals was perfectly consistent with established Fifth and Sixth Amendment law. The instant Petition falls far short of justifying discretionary review under Sup. Ct. R. 17.

1. **WILSON ADEQUATELY ASSERTED HIS RIGHT TO COUNSEL AT THE INITIAL APPEARANCE.**

The Commonwealth contends that Wilson's statement at the initial appearance that he would retain his own counsel and was attempting to arrange for such representation was inadequate to assert Wilson's right to counsel. The Commonwealth's argument is that the right to counsel is only asserted when an accused requests that counsel be appointed. That argument is completely contrary to established Fifth and Sixth Amendment doctrine and the reasoning underlying that doctrine.

When Wilson was taken from the jail to the initial appearance, he appeared in court as a defendant who was "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." Kirby v. Illinois, 406 U.S. 682, 689 (1972). Up until that point, he had protected himself as well as he knew how. He had refused to sign anything, including the innocuous form indicating that the police had not taken any property from him.

At the initial appearance, Wilson was given an opportunity to tell the Commonwealth that he did not want to deal directly with it any longer, but wanted the Commonwealth to deal with him through the medium of counsel. See Michigan v.

Jackson, 106 S. Ct. at 1408-09 (citing Maine v. Moulton, 474 U.S. 159, ___, 106 S. Ct. 477, 487 (1985)). Wilson did not merely make a passing reference to counsel, but stated that he would be represented by counsel thereafter and was attempting to arrange for such representation. He did not waive his right to counsel or indicate that he would be proceeding pro se, as he could have done if he had wished to deal directly with the Commonwealth.

The Commonwealth seeks to create an artificial distinction between an accused's statement that he wishes to have counsel appointed and a statement that he wishes to be represented by counsel of his own choosing. Only if the accused is indigent and has counsel appointed would the Commonwealth find that the right to counsel attaches. This distinction is both hypertechnical and irrational, as the two types of statement equally demonstrate a desire to be represented by counsel in future dealings with the State. In rejecting the Commonwealth's argument, the Court of Appeals noted,

> This rather strained argument cannot be reconciled with the Supreme Court's decision in Michigan v. Jackson, 106 S. Ct. 1405 (1986), where the Court rejected a similar argument and indicated that defendants' requests for counsel should be construed broadly. We agree that an uncounseled prisoner, untutored in law, cannot be stripped of his constitutional rights because of such technicalities. A defendant's statement that he intends to arrange representation is equivalent to a request for an attorney.

4a. The distinction the Commonwealth urges would create a presumption in favor of finding a waiver of the right to counsel by a defendant with retained counsel, whereas fundamental Fifth and Sixth Amendment doctrine establishes a presumption against waiver and requires the State to satisfy a heavy burden in proving a waiver. See, e.g., Michigan v. Jackson, 106 S. Ct.

at 1409; Johnson v. Zerbst, 304 U.S. 458, 464 (1938). This Court has always recognized that the right to counsel attaches just as securely to a defendant who retains his own counsel as to an indigent defendant for whom counsel is appointed. See, e.g., Brewer v. Williams, 430 U.S. 387 (1977) (defendant with retained counsel); Weatherford v. Bursey, 429 U.S. 545 (1977) (same); Massiah v. United States, 377 U.S. 201 (1964) (same).

The Court of Appeals correctly concluded that Wilson asserted his right to counsel. That conclusion is not in conflict with any decision by this Court or by any other Circuit. This Court should not grant review of that conclusion.

2. THE POLICE SUBJECTED WILSON TO THE FUNCTIONAL EQUIVALENT OF INTERROGATION.

Either on the day of Wilson's initial appearance in court or the following day, and before Wilson had a chance to retain and confer with counsel, the police, acting purely on their own initiative, gratuitously undertook to advise Wilson that they had his co-defendant Sessoms in custody, then transported Wilson to the Detective Bureau and confronted him with Sessoms. As Detective Hemenway testified, the police took these actions because Sessoms had indicated that Wilson would talk with them once he knew that they had Sessoms in custody and that Sessoms had cooperated with them. The only conceivable purpose for these actions by the police was to obtain a confession from Wilson, and the Commonwealth has never proffered any other purpose. Indeed, to suggest that the police had any other purpose, such as to allow Wilson and Sessoms to renew their friendship, would be ludicrous.

The record does not clearly establish whether the police verbally questioned Wilson during this encounter. (Compare J.A. 110-11, 118-19 with J.A. 123-27). Even if they did not, however, they clearly engaged in the "functional

equivalent" of express questioning. The police may not circumvent the constitutional limitations on questioning by engaging in its functional equivalent: "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301 (1980) (footnotes omitted).

The police not only should have known that confronting Wilson with Sessoms was reasonably likely to elicit an incriminating response from Wilson, they did know such a response was likely and they fully intended to elicit such a response. (See J.A. 109-10, 118).

> Confronting an accused with incriminating evidence is a common and traditional way of prompting a recalcitrant suspect to confess. That it is also frequently an effective tactic may be judged by the volume of cases involving confessions so induced. . . . Faced with evidence indicating that the police already believe him to be guilty, an accused may conclude that he has nothing to lose by making a statement, or may fear that silence will be taken as an admission of guilt.

Toliver v. Gathright, 501 F. Supp. 148, 153 (E.D. Va. 1980) (footnotes omitted) (telling defendant about co-defendant's statement constituted functional equivalent of questioning); see also Wainwright v. State, 504 A.2d 1096, 1102-03 (Del.) (same holding), cert. denied, 107 S. Ct. 236 (1986); Tierney v. State, 404 So. 2d 206 (Fla. App. 1981) (same holding); People v. Thompson, 107 Ill. App. 3d 285, 437 N.E.2d 916 (1982) (telling defendant of co-defendants' incriminating statements and then, upon his expression of disbelief, taking defendant to see co-defendant in custody, constituted interrogation).

The Commonwealth asserts that the recent decision in Arizona v. Mauro, 107 S. Ct. 1931 (1987), compels a conclusion

that the police did not interrogate Wilson. This assertion fails to recognize the fundamental differences between Mauro and Wilson's circumstances. In Mauro, the suspect's wife, Mrs. Mauro, was being questioned at the police station at the same time that Mr. Mauro was being held there. Mrs. Mauro implored the police offers to let her talk with her husband. The police were reluctant to allow this contact to take place and counseled Mrs. Mauro not to speak to her husband, but finally gave in to Mrs. Mauro's continued entreaties. This contact between spouses led to the statement which was in issue.

This Court expressly noted, in finding that the police had not interrogated Mr. Mauro, "There is no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements." Id. at 1936 (emphasis added). Rather, the police reluctantly yielded to the entreaties of a distraught wife who wanted to see her husband. By contrast, the admitted purpose and the only conceivable purpose for the Norfolk police to confront Wilson with Sessoms was to induce Wilson to talk with them. Sessoms was not a spouse who wanted to talk with a spouse about the fate of their child, but was a co-defendant whose presence in jail and cooperation with the police would convince Wilson that he might as well talk with the police. The police's ploy worked exactly as planned, according to their purpose.

This Court noted in Mauro that there was good reason to "doubt that a suspect, told by officers that his wife will be allowed to speak to him, would feel that he was being coerced to incriminate himself in any way." Id. The Commonwealth speculates that Wilson similarly would have felt no coercion when confronted with Sessoms. Such speculation runs completely counter to common sense and traditional police tactics for

coercing statements, as noted in Toliver v. Gathright, supra. Sessoms and the police analyzed Wilson's likely perceptions and predicted that Wilson would feel coerced by Sessoms' presence. That prediction proved accurate, and there is no basis for second-guessing it now.[3/]

In addition, the focus on the perceptions of the suspect, while appropriate in a Fifth Amendment case like Mauro, is inapplicable to the extent the Court of Appeals' decision rests on the Sixth Amendment.

> Once the sixth amendment right to counsel attaches, law enforcement authorities cannot "deliberately elicit" incriminating statements from the accused in the absence of counsel. Massiah v. United States, 377 U.S. [201] at 206, 84 S. Ct [1199] at 1203 [(1964)]. To determine whether the authorities "deliberately elicited" a statement, courts look primarily to the intent of the police. [footnote] This is in contrast to the fifth amendment right to counsel inquiry.

United States v. Criswell, 696 F.2d 636, 639 & n.7 (8th Cir. 1983). As previously noted, the intent of the police here was to elicit a statement from Wilson.

The other case the Commonwealth cites on the issue of what constitutes interrogation, People v. Ferro, 92 A.D.2d 298, 460 N.Y.S.2d 585 (1983), provides even less support to the Commonwealth's argument. The Commonwealth neglects to tell the Court that this decision by the New York Supreme Court,

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3/ Even if there were a factual basis for speculating that Wilson did not feel coerced, that would not be dispositive. In Mauro, the Court cited Rhode Island v. Innis, 446 U.S. at 301, as "suggesting that the suspect's perspective may be relevant in some cases in determining whether police actions constitute interrogation." 107 S. Ct. at 1936 (emphasis added). The cited passage from Innis goes on to note that the intent of the police is also relevant and applies the element of police intent to the objective standard: "In particular, where a police practice is designed to elicit an incriminating response from the accused, it is unlikely that the practice will not also be one which the police should have known was reasonably likely to have that effect." 446 U.S. at 301 n.7.

Appellate Division, was reversed by the Court of Appeals of New York. See People v. Ferro, 63 N.Y.2d 316, 472 N.E.2d 13, 482 N.Y.S.2d 237 (1984), cert. denied, 472 U.S. 1007 (1985). In reversing, the Court of Appeals of New York expressly found that confronting the suspect with incriminating evidence did constitute questioning. "Where . . . the only possible object of the police action in revealing evidence to a defendant is to elicit a statement from him, it does no violence to logic to conclude that the police should have known that it would do so . . . ." Id. at 323-24, 472 N.E.2d at 17, 482 N.Y.S.2d at 241 (citations omitted).

The Commonwealth complains that the Court of Appeals for the Fourth Circuit did not explicitly address this issue in its written decision. At oral argument, the Court of Appeals engaged counsel for the Commonwealth in a lengthy colloquy on this issue and gave full consideration to counsel's arguments. In thereafter simply stating in the written decision its conclusion that Wilson was, in fact, interrogated (4a, 9a-10a), the Court of Appeals gave the Commonwealth's argument precisely the weight it deserves. This Court should not give this argument any further consideration.

CONCLUSION

The instant Petition utterly fails to satisfy the standard established in Sup. Ct. R. 17 as to when this Court will exercise its discretion to grant a writ of certiorari. The Court of Appeals correctly applied the decisions of this Court and of the other Courts of Appeal. The Petition should be denied.

Respectfully submitted,

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